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NO. 91-1950

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

AMERICAN DREDGING COMPANY
Petitioner

vs.

WILLIAM ROBERT MILLER
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTION PRESENTED

The question presented by this petition is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "saving to suitors" clause.

LIST OF PARTIES

The parties to the action are William Robert Miller and American Dredging Company.

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IN THE SUPREME COURT OF THE UNITED STATES
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WILLIAM ROBERT MILLER
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner American Dredging Company respectfully prays that a Writ of Certiorari issue to review the Judgment and opinion of the Supreme Court of the State of Louisiana entered on March 2, 1992.

OPINIONS BELOW

All opinions below are contained in appendices to this Petition. The opinion of the trial court, the Civil District Court for Orleans Parish in Louisiana, is reproduced in Appendix a, *infra*, p. A-3. Its judgment, dismissing petitioner's exception and maritime defense of *forum non conveniens*, also appears in Appendix a, *infra*, p. A-1. The opinion of the Louisiana Fourth Circuit Court of Appeal, affirming the trial court judgment, is reported at *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991) and is reproduced in Appendix b, *infra*, p. A-5. The Louisiana Supreme Court's opinion, reversing the appellate court and the trial court judgments, is reported at *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). It is reproduced in Appendix c, *infra*, p. A-8.

JURISDICTIONAL STATEMENT

The judgment of the Louisiana Supreme Court (Appendix c, *infra* p. A-10) was entered on March 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257 (West Supp. 1992).

CONSTITUTIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

Article III, Section 2, Clause 1 of the United States Constitution provides:

> The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to

> all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; -to Controversies between two or more States; - between a state and Citizens of another state; between Citizens of different States; - between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U.S.C.A. § 1333 (1949), commonly known as the "saving to suitors" clause, provides in pertinent part as follows:

> The district courts shall have original jurisdiction, exclusive of the courts of the States of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Louisiana Code of Civil Procedure Article 123 provides as follows:

A. For the convenience of the parties and witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent

jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.

B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.

C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 U.S.C.A. § 688 or federal maritime law.

STATEMENT OF CASE

William Robert Miller, Sr., petitioner, is a resident of Mississippi. In August of 1987, he moved to Pennsylvania where he joined the Union of Operating Engineers, Local 25 in Philadelphia, Pennsylvania. Through the union, he was hired by American Dredging Company ("American Dredging") to work aboard the Tug JOHN R in the Delaware River. American Dredging is a Pennsylvania corporation with its principal place of business in Camden, New Jersey, which is located just across the Delaware River from Philadelphia.

This action arises out of an accident allegedly sustained by Mr. Miller aboard the Tug JOHN R amid operations in the Delaware River on December 12, 1987. The Tug JOHN R does not now nor has it ever navigated in Louisiana waters. The situs of the vessel's operations is the Delaware River near Camden, New Jersey, where the vessel can be available for inspection during discovery, if necessary.

Mr. Miller was initially treated at Sacred Heart Medical Center in Chester, Pennsylvania. Subsequently, at the direction of his New York counsel, he was treated at the Hospital for Joint Diseases Orthopedic Institute located in New York City. In February of 1988, Mr. Miller returned to Mississippi where he has been treated by other physicians.

On December 1, 1989, Mr. Miller filed this suit against American Dredging in Louisiana state court, the Civil District Court for the Parish of Orleans. American Dredging filed exceptions, challenging personal jurisdiction and requesting a dismissal pursuant to the doctrine of *forum non conveniens*. On September 21, 1990, the exceptions were heard. On September 25, 1990, District Judge Fedoroff entered his reasons for judgment and expressly concluded as follows:

> It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse [*sic*] sort. Appendix a, *infra*, p. A-4.

Following federal maritime authority, the trial court dismissed the action subject to the right of the claimant to proceed in Pennsylvania.[1]

On October 26, 1990, plaintiff filed a motion for suspensive appeal. On November 8, 1990, the appeal order was signed by Judge Fedoroff. On May 6, 1991, the Louisiana Fourth Circuit Court of Appeals heard argument. In its decision of May 30, 1991, the Fourth Circuit affirmed the decision of the lower court, holding that the dismissal was proper under the admiralty doctrine of *forum non conveniens*. *Miller v. American Dredging Co.*, 580 So. 2d 1091 (La. App. 4th Cir. 1991). The appellate court specifically held as follows:

> In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navi-

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[1] The defendant has waived any claim that the suit is time-barred should the plaintiff bring the action in a Pennsylvania court of competent jurisdiction.

> gated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

Miller, 580 So. 2d at 1093; Appendix b, *infra*, p. A-8.

On June 28, 1991, Mr. Miller petitioned the Louisiana Supreme Court to review the decision of the Fourth Circuit Court of Appeals. By order dated October 18, 1991, the Louisiana Supreme Court granted the writ to review the decision of the Fourth Circuit. On March 2, 1992, the Louisiana Supreme Court reversed the decision of the trial and appellate courts, declining to apply the doctrine of *forum non conveniens* to the state court action. *Miller v. American Dredging Co.*, 595 So. 2d 615 (La. 1992). Relying upon federal diversity cases, the Court concluded that it could apply Louisiana procedural law, which does not recognize *forum non conveniens* dismissals in maritime and Jones Act cases. In particular, the Court stated as follows:

> Thus, the only interest of defendant affected by the application of our state procedure is one of convenience. We find this interest by itself does not rise to the level of a substantial right.
>
> In sum, we find that the doctrine of *forum non conveniens* is not a substantive feature of the general maritime law. Accordingly, we find application of Louisiana's *forum non conveniens* rule is not preempted by federal admiralty law. Since our procedural rule precludes dismissal of this Jones Act/general maritime case on the ground of *forum non conveniens*, the lower courts erred in holding otherwise.

Miller, 595 So. 2d at 619; Appendix c, *infra*, p. A-19.

American Dredging respectfully presents this petition for a writ of certiorari to resolve the conflict concerning the application of this important doctrine to maritime cases filed in state court.

ARGUMENT

The question presented by this petition is whether the doctrine of *forum non conveniens* as applied in admiralty is applicable to maritime claims filed in state courts pursuant to the "saving to suitors" clause.[2] Stated in adversarial terms, is a maritime defendant entitled to a trial in a convenient forum pursuant to this doctrine or may a maritime claimant evade application of this doctrine by filing the action in state court?

CONFLICT OF AUTHORITY

There is presently a clear-cut conflict of authority in response to this question. In the decision below, the Louisiana Supreme Court held that "the doctrine of *forum non conveniens* is not a substantive feature of maritime law" and refused to apply it to the instant Jones Act/general maritime claim. *Miller*, *supra* at 617; *see also Markzannes v. Bermuda Star Line, Inc.*, 545 So. 2d 537 (La. 1989), *cert. denied, Bermuda Star Line, Inc. vs. Markozannes*, 493 U.S. 1043, 110 S. Ct. 837 (1990). In place of this doctrine, the Louisiana Court applied state procedural law

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[2] While the Constitution extends the judicial power of the federal courts to "all Cases of admiralty and maritime jurisdiction, the Judiciary Act of 1789 recognized the concurrent jurisdiction of state courts over certain maritime matters. U.S. Const. art. III, sec. 2, C1.1; Friedell, *Benedict on Admiralty* 1 §§ 105, 121, 122 (7th ed. 1991). "The district courts shall have original jurisdiction, exclusive of the courts of the States, of [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C.A. § 1333 (1949).

which prohibits *forum non conveniens* dismissals of Jones Act and federal maritime claims.[3]

In direct conflict with the Louisiana procedural rule, the United States Court of Appeals for the Fifth Circuit has repeatedly recognized that "*forum non conveniens* is 'a characteristic feature' of maritime law," which state and federal courts are bound to apply in maritime cases. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990); *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988), *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd on other grounds, 486 U.S.140, 108 S. Ct. 1684 (1988). In *Ikospentakis*, the Fifth Circuit even declined to permit a voluntary dismissal of a Jones Act federal suit because, to permit same, would have unfairly prejudiced the defendant to state court litigation without safeguarding the defendant's right to a trial in a convenient forum:

> There is some irony in our conclusion. Our court has previously determined that a federal maritime defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d at 307

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[3] *Miller, supra* at 617 - 619. To be precise, the Court reaffirmed its jurisprudence that Louisiana courts may not dismiss on grounds of *forum non conveniens* except as provided by statute. *Fox v. Board of Supervisors of Louisiana State University etc.*, 576 So. 2d 978 (La. 1991). Since Louisiana's statute is expressly inapplicable to Jones Act and maritime cases, the Court declined to dismiss the case even though the trial court (Civil District Court) had concluded that it was "patent that the Civil District Court [was] not a convenient forum," and that "[s]election of [the Civil District Court], having absolutely no connection with the case, [was] forum shopping of the worse (sic) sort." Appendix a, *infra*, p. A-3.

(decision reversed on other grounds). We endorse that holding again. Louisiana courts have definitely refused to recognize this ruling. *Markzannes*, 545 So. 2d at 537. If there were any ambiguity in Louisiana's law, we would be inclined to enforce *Chick Kam Choo* rigorously and hold that there was no "plain legal prejudice" suffered by these appellants, because Louisiana courts must recognize the preemptive force of the federal *forum non conveniens* doctrine in this seaman's case. At some point, Louisiana must bend to the federal courts' construction of federal law. However, to insist that these foreign appellants become guinea pigs in an effort to overturn Louisiana's erroneous rule would blink at reality and would needlessly subject them to considerable expense as well as legal prejudice for the sake of vindicating principle. We need not reach such an unjust result."

Ikospentakis, 915 F.2d at 180; accord *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990).

IMPACT OF THE CONFLICT UPON MARITIME COMMERCE

Petitioner respectfully prays that the Supreme Court resolve this important question. This conflict promotes multiple litigation and vexatious forum selection. Without resolution of this conflict by this Court, maritime claimants dissatisfied with this maritime doctrine will increasingly "shop" for friendlier fora with procedural or other laws which ignore this maritime doctrine. Some claimants initiate litigation in federal court and, after an adverse ruling by federal court, file subsequent actions or activate dormant state court actions. *See, e.g., Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990); *Zipfel v.*

Halliburton Co., 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Ikospentakis*, *supra* at 177. *Kassapas v. Arkon Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir.), *cert. denied*, 488 So. 2d 203 (La. 1986) *cert. denied*, 479 U.S. 940, 107 S. Ct. 422 (1986); *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Symeonides v. Cosmar Compania Naviera, S.A.*, 433 So. 2d 281 (La. App. 1st Cir. 1983), *cert. denied*, 440 So. 2d 731 (La. 1983), *cert. denied*, 465 U.S. 1079, 104 S. Ct. 1442 (1984). *cf. Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977); *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448 (2d Cir. 1975), *cert. denied*, 423 U.S. 1052, 96 S. Ct. 781 (1976); *see also*: *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), *cert. denied*, 474 U.S. 948, 106 S. Ct. 347 (1985) and *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 671 (1991) (reflecting the practice of multiple filings in non-marine cases). The arduous trek of the *Choo* litigation through the federal and state courts amply underscores the need for resolution of this conflict.[4]

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[4] In March, 1978, Chick Kam Choo, a Singapore resident, filed a maritime civil action in federal court in Houston. In the federal action, Choo asserted claims under the Jones Act, the Death on the High Seas Act, the general maritime law and the Texas wrongful death statutes. On July 31, 1980, the federal court dismissed the suit under the maritime doctrine of *forum non conveniens*. Choo failed to appeal timely, but sought to have the federal court's judgment set aside. Relief was denied and the denial was affirmed by the Fifth Circuit Court of Appeals. *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.), *cert. denied*, 464 U.S. 826 (1983). In January 1984, Choo filed a Texas state court action which was removed to federal court on the basis of diversity. Remand was denied by the federal trial court, but the denial was reversed by the Fifth Circuit because complete diversity was lacking. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir. 1985). Subsequently, Exxon filed an independent action in federal

In absence of uniform recognition of this maritime doctrine, the current practice of multiple adjudications and extensive forum shopping will continue even in the face of explicit adverse federal judgments. It is difficult to conceive of a greater impediment to maritime commerce than the unfettered exposure of maritime interests to multiple litigation in inconvenient fora without regard to uniform principles of admiralty. In this context, the comments of Justice Jackson regarding choice of law questions in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921 (1953), seems particularly appropriate:

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international

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[4] (cont'd)

court in Houston, seeking to enjoin the relitigation of this case in state court. In May, 1986, the federal court entered a judgment enjoining Choo from prosecuting any further state action regarding this incident. This injunction was affirmed by the Fifth Circuit on the basis of the preemptive effect of the former federal decision. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987). This Court granted certiorari and reversed on other grounds. *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S. Ct. 1684, (1988) (*"Choo III"*). In April 1990, Exxon moved for summary judgment in Texas state court, seeking dismissal under the maritime doctrine of *forum non conveniens*. In May 1990, the trial court granted the Exxon motion and held that the state law of Texas is preempted by federal maritime law and the case should be dismissed on the basis of *forum non conveniens*. This decision was reversed by the Fourteenth Court of Appeals and that reversal is currently being reviewed by the Supreme Court of Texas. *Chick Kam Choo v. Exxon Corp.*, 821 S.W.2d 190 (Tx. App. 14th Dist. 1991).

> carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a nonnational or international maritime law of impressive maturity and universality.

345 U.S. at 581, 73 S. Ct. at 928.

It is submitted that the decision of the Louisiana Supreme Court will perpetuate the present practice of forum shopping and multiple litigation and produce a grave and real impact upon maritime commerce unless the conflict is resolved by this Court.[5]

FORUM NON CONVENIENS IS AN INTEGRAL PART OF ADMIRALTY

The doctrine of *forum non conveniens* is the legal principle which governs the discretionary exercise of jurisdiction in cases where the forum may be inappropriate or inconvenient for effective resolution of the dispute at issue. Where appropriate, the trial court may, in its discretion, dismiss the case subject to protecting the right of the plaintiff to proceed in a suitable forum. In its present form, the doctrine accords deference to the plaintiff's choice of forum while examining various private and public factors which affect the discretionary retention or dismissal of jurisdiction. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981).

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[5] A similar conflict looms on the horizon between this maritime doctrine and Texas procedural law which likewise does not recognize *forum non conveniens*. *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674 (Tex. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 671 (1991).

The modern exposition of the doctrine of *forum non conveniens* was articulated by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947) and *Koster v. (American) Lumbermen's Mut. Casualty Co.*, 330 U.S. 518, 67 S. Ct. 828 (1947). While those cases concerned the doctrine's application in diversity (non-maritime) cases, the underlying principle of *forum non conveniens* - the discretionary exercise of jurisdiction - is deeply rooted in admiralty jurisprudence. See, e.g. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (C.C.D. Md. 1804); *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885); *Charter Shipping Co., v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 50 S. Ct. 400 (1930); *Canada Malting Co. v. Paterson S.S., Ltd.*, 285 U.S. 413, 52 S. Ct. 413 (1932). As noted in Justice Black's dissent to the *Gilbert* decision, the power to decline to exercise jurisdiction relates to "reasons peculiar to the special problems of admiralty and to the extraordinary remedies of equity . . ." *Gilbert*, 330 U.S. at 513.

As early as 1804, this Court discussed the discretionary jurisdiction of admiralty in a salvage case involving a French ship salved by British vessel and brought into an American port. *Mason v. Ship Blaireau*, 6 U.S. (2 Cranch) 240 (C.C.D. Md. 1804). Since neither side objected to the proceedings, Chief Justice Marshall made the following observation about the jurisdiction of the admiralty court:

> In this case, a preliminary question has been made, by the counsel for the plaintiffs, which ought not to be disregarded. As the parties interested except the owners of the cargo of the Firm, are not Americans, a doubt has been suggested, respecting the jurisdiction of the court, and upon a reference to authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of gen-

> eral policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. *On weighing the considerations drawn from public convenience, those in favour of the jurisdiction, appear much to overbalance those against it*, and it is the opinion of this court, that, whatever doubts may exist in a case, where the jurisdiction may be objected to, there ought to be none where the parties assent to it.

Mason, 6 U.S. at 264. (Emphasis added.)

In the 1885 decision of *The Belgenland*, 114 U.S. 355, 5 S. Ct. 860 (1885), this Court reviewed various elements affecting the exercise of jurisdiction in a case involving a high seas collision between a Norwegian bark and a Belgian steamship. These included such considerations as the nationality of the parties, location of the tort, location of the *res*, convenience of the parties, treaty provisions, choice of law, etc. *Belgenland*, 114 U.S. at 361-368. The Court's approval of the decision to retain jurisdiction recognized the underlying discretion of the admiralty trial court to make this jurisdictional determination. *The Belgenland*, 114 U.S. at 367, 368.

This discretion was again recognized by this Court in the *Charter Shipping* and *Canada Malting* decisions, *supra*. In *Canada Malting*, Justice Brandeis explicitly upheld the discretion of the trial court to decline jurisdiction even though the collision occurred in United States waters and regardless of whether American law would have afforded the claimant a more favorable recovery:

> The libelants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse

> to retain jurisdiction, and that the exercise of its discretion will not be disturbed unless abused. (Citations omitted.)

* * *

First. The contention that the jurisdiction was obligatory rests upon the fact that the collision occurred within the territorial waters of the United States. The argument is that a cause of action arising from a collision occurring on territorial waters of the United States arises out of its laws, since within its territory there can be no other law. (Citations omitted.)

* * *

> We have no occasion to inquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy.

Canada Malting, 285 U.S. at 414.

This Court has recently reviewed the nature and relative importance of the private factors and public interests considered in the *forum non conveniens* evaluation. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S. Ct. 252 (1981). These factors concern the availability of a suitable alternative forum to redress the principal claims, the private interests of the parties including deference to the claimant's choice of forum and convenience considerations, such as ease of proof and evidentiary problems, and the public interest of the forum in the dispute in question.

In *Choo, supra*, the Fifth Circuit presented an extensive analysis of the relationship between *forum non conveniens* and state law. *Choo*, 817 F.2d at 316-321. Noting that the underlying Constitutional protection of maritime commerce was effectuated by uniform application of this doctrine and was undermined by the potential application of local law, the Fifth Circuit explicitly upheld the doctrine's application by state courts in admiralty and maritime cases. *Choo*, 817 F.2d at 318-321.

As yet there has been no dispositive ruling on this question by this Court. The decision of this Court in *Choo* upheld the right of the Texas state courts to make an independent *forum non conveniens* determination. The Texas courts were "presumed competent to resolve federal issues." *Choo*, 486 U.S. at 150; 108 S. Ct. at 1691. Arguably, the decision presupposes that the admiralty doctrine of *forum non conveniens* was the applicable discretionary standard which the Texas court was to apply. However, this precise issue was not decided although Justice O'Connor acknowledged, without upholding, the Fifth Circuit's recognition of the preemptive effect of this admiralty doctrine. *Choo*, 486 U.S. at 150, 108 S. Ct. at 1691; *see also* the concurring opinion of Justice White which acknowledged the "substantial" federal interest in uniformity in admiralty and the potential preemptive effect of federal *forum non conveniens* rulings. *Choo*, 486 U.S. at 151; 108 S. Ct. at 1692.

In view of this Court's established jurisprudence, many lower federal courts have frequently recognized this doctrine in maritime personal injury and Jones Act claims. *Ikospentakis v. Thalassic S. S. Agency*, 915 F.2d 176 (5th Cir. 1990), *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988), *Exxon v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), rev'd on other grounds, 486 U.S. 140, 108 S. Ct. 1684 (1988), *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir.

1983); *De Mateos v. Texaco, Inc.*, 562 F.2d 895 (3d Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S. Ct. 1449 (1978); *Pain v. United Technologies Corp.*, 637 F.2d 775 (D. C. Cir. 1980) (involving claims under the Death on the High Seas Act relating to the helicopter crash into North Sea); *Gonzalez v. Naviera Neptumo A.A.*, 832 F.2d 876 (5th Cir. 1987); *La Seguridad v. Transytur Line*, 707 F.2d 1304 (11th Cir. 1983); *Vargas v. M/V Mini Lama*, 709 F. Supp. 117 (E.D. La. 1989); *Pastewka v. Texaco, Inc.* 565 F.2d 851 (3d Cir. 1977); *Gazis v. John S. Latsis Inc.*, 729 F. Supp. 979 (S.D. N.Y. 1990); *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021 (N.D. Cal. 1985); *cf. Hernandez v. Cali, Inc.*, 32 A.D.2d 192 (N.Y. App. Div. 1969). *Forum non conveniens* has likewise been recognized as a principle of maritime law by the major treatises on admiralty.[6]

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[6] *Benedict, supra*, at § 129, pp. 8.41 - 8.57; Gilmore & Black, *The Law of Admiralty*, §§ 1-19, pp. 51-52 (2d ed. 1975); Baer, *Admiralty Law of the Supreme Court*, § 17-2, p. 488 (3d ed. 1979); Healy & Sharp, *Admiralty Cases & Materials*, Ch. 2, § F, pp. 157-162 (2d ed. 1986); Schoenbaum, *Admiralty and Maritime Law*, §§ 5-8, 8-8, 13-9, 20-6, 11, pp. 189, 270, 477, 478, 639, 651-653 (1987). While recognition of this doctrine has been largely uniform among the circuits, a few courts have suggested that when American law is applicable a dismissal is improper since it would undermine the application of U. S. law. See: *Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1486 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054, 108 S. Ct. 2819 (1988); *Needham v. Phillips Petroleum Co.*, 719 F.2d 1481, 1483 (10th Cir. 1983); *Szumlicz v. Norwegian American Line, Inc.*, 698 F.2d 1192, 1195 (11th Cir. 1983); *Fisher v. The Agios Nicolaos V*, 628 F.2d 308 (5th Cir. 1980), *cert. denied*, 454 U.S. 816, 102 S. Ct. 92 (1981), overruled by *In re Air Crash near New Orleans*, 821 F.2d 1147 (5th Cir. 1987). However, none of these decisions directly considered the effect of this Court's holding in *Reyno* that the "possibility of the change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry." *Reyno*, 454 U. S. at 247. Following the *Reyno* directive, the Fifth and Second Circuits have recognized the vitality of this doctrine even though its discretionary application might

THE *MILLER* DECISION

The Louisiana Supreme Court concluded that the doctrine of *forum non conveniens* concerns only the "convenience" of the defendant which did not "rise to a level of a substantial right." *Miller, supra* at 619 (Appendix c, *infra*, p.A-19). This conclusion stands in direct conflict with the widespread recognition of this doctrine in maritime cases, the deeply-rooted relationship of this doctrine to admiralty, and the explicit holdings of the Fifth Circuit in *Ikospentakis*, *Camejo* and *Choo*, *supra*. This conclusion also seems inaccurate in light of this Court's pronouncement in the non-maritime *Reyno* decision:

> Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

Reyno, 454 U.S. at 256; 102 S. Ct. at 266.

Eschewing an analysis of admiralty jurisprudence, the Louisiana Court was persuaded to its view by the instructive decisions of federal diversity cases and by consideration of the "so-called 'reverse-*Erie*' doctrine." *Miller, supra* at

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[6] (cont'd)

cause a change in applicable substantive law. *Aircrash*, 821 F.2d at 1163-1164; *Cruz*, 702 F.2d at 48; *Vargas* 709 F. Supp. at 118. See also the excellent analyses of District Judges Schwartzer and Tenney in the *Sherrill* and *Gazis* cases, respectively. *Gazis v. John S. Latsis Inc.*, 729 F. Supp. 979, 986 (S.D. N.Y. 1990); *Sherrill v. Brinkerhoff Maritime Drilling*, 615 F. Supp. 1021, 1033-1035 (N.D. Cal. 1985). A dismissal for *forum non conveniens* in this case would not affect the applicable law. Jones Act and general maritime law would be applied whether the case is tried in Louisiana or Pennsylvania.

618 (Appendix a, *infra*, p. A-17). Using this approach, the Court inferred that *forum non conveniens* was a matter of federal procedural law inapplicable to maritime actions filed in state court. *Miller, supra* at 618. The Court therefore concluded that Louisiana courts were free to ignore the federal doctrine and apply Louisiana procedural law.[7] Since Louisiana's *forum non conveniens* law was not applicable to federal maritime cases[8], there was no basis for a dismissal based on convenience.

Forum non conveniens is, however, not a mere procedural device which becomes inapplicable under a "reverse-*Erie*" analysis. In the first place, there is no mechanical "reverse-

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[7] Louisiana Code of Civil Procedure Article 123(C). The Louisiana Court relied upon this Court's decision in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1 (1950), but *Mayfield* is inapposite to the case at bar. Therein, this Court held in a claim under the Federal Employer's Liability Act, 45 U.S.C. § 51 *et seq* (FELA), that the Missouri state court was free to "decide the availability of the principle of *forum non conveniens* according to its own local law." *Mayfield, supra* at 3. While it is true that the Jones Act, incorporates the FELA liability standards, FELA does not thereby supplant the underlying uniform principles of admiralty. It would be ludicrous to suppose that by adopting a liability standard applicable to railroad workers, Congress had unwittingly destroyed the uniformity of admiralty protected by the Constitution. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875). Accordingly, in absence of an express federal pronouncement regarding this doctrine, state courts remain bound to apply the federal *forum non conveniens* law to maritime cases.

[8] Curiously, Louisiana procedural law permits *forum non conveniens* dismissal of other actions arising under federal law (La. Code Civ. Proc. Ann. art. 123 (B) (West Supp. 1992)) but prohibits such dismissal in maritime cases where uniformity of the admiralty rule would normally control.

Erie" scale which can be employed to solve such choice of law problems. The reference to "reverse-*Erie*" theory stems from considerations of parallel, though not altogether symmetrical or reciprocal, principles involving the uniformity doctrine of admiralty, the "savings to suitors" clause and the *Erie* doctrine.[9] The uniformity doctrine of admiralty law mandates that its tenets be applied uniformly by all federal and state courts. The "savings to suitors" clause allows maritime claimants access to state courts without infringing upon those uniform principles. The *Erie* doctrine mandates that state substantive principles be applied by federal courts in diversity cases.[10] The "reverse-*Erie*" concept is no doctrine at all, but a handy metaphor to recognize the potential application of federal or state procedure when not in conflict with underlying legal principles.[11]

This metaphor, however, does not permit a mechanical resolution of this dispute by facile reference to concepts of "substance" and "procedure." Legal principles do not always fall neatly into such finite categories. *Forum non conveniens* has been an established feature of admiralty since long before the articulation of the *Erie* doctrine or the enactment of federal procedural rules.[12] Furthermore, such a nominal analysis overlooks the reality that many fundamental principles of admiralty,

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[9] See the discussion of the Fifth Circuit in *Choo*, 817 F.2d at 319.

[10] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

[11] The *Miller* Court's reference to this Court's decision in *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 106 S. Ct. 2485 (1986) seems particularly inapposite. Nothing in *Tallentire* warrants the disavowal of such a deeply-rooted admiralty principle in favor of a local procedural rule.

[12] Fed.Rules Civ.Proc.Rules 1-86, 28 U.S.C.A.

while directly affecting procedure, are nonetheless characteristic features which make admiralty a distinct and unique body of law. For example, maritime law's protection of seamen as wards of the admiralty court finds direct expression in legal rules which govern procedural questions of burden of proof and sufficiency of evidence. See e.g.: *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 63 S. Ct. 246 (1942); *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S. Ct. 886 (1961). The rules are no less applicable in state court because they impact and conflict with state procedural rules. *Neely v. Hollywood Marine, Inc.*, 530 So. 2d 1116, 1122-1123 (La. 1988), *cert. denied*, 489 U.S. 1080, 109 S. Ct. 153 (1989); *Bennett v. Sedco Maritime*, 520 So. 2d 894, 905 (La. App. 3d Cir. 1987).

In *Garrett, supra*, this Court explicitly upheld the application of the admiralty burden of proof rule and overturned a Pennsylvania Supreme Court decision which held the issue was procedural and therefore controlled by state law. This Court noted that the "deeply rooted" admiralty rule regarding burden of proof was a "part of the very substance of [the seaman's] right and [could] not be considered a mere incident of a form of procedure." *Garrett, supra*, at 252, 253. The language of Justice Black in *Garrett* regarding the interplay of admiralty law and state practice is particularly instructive:

> It must be remembered that the state courts have concurrent jurisdiction with the federal courts to try actions either under the Merchant Marine Act or *in personam* such as maintenance and cure. The source of the governing law applied is in the national, not the state, governments. *If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but would*

> *actually deny, federal rights* which Congress, by providing alternative remedies, intended to make not less, but more secure. (Emphasis added.)

Garrett, 317 U.S. at 245.

Forum non conveniens, like many admiralty principles, affects traditional notions of procedure while effectuating the essential protection of maritime law available to all litigants. This doctrine provides appropriate deference to the plaintiff's choice of forum while protecting the maritime defendant from exposure to an unreasonable, vexatious and oppressive forum selection and allowing the public tribunal to consider its interest in the dispute. This important protection of the rights of all maritime litigants should be uniformly applied in state and federal courts.

The application of this doctrine in state court does not mean that state interests are not relevant and may not be considered. The doctrine is, by nature, a discretionary function of the local court and consideration of relevant public and private factors is mandated by the *forum non conveniens* process. Therefore, in cases where the state has significant interest in the dispute, the discretionary balance will undoubtedly weigh in favor of retaining jurisdiction. However, in those cases where there is little or no such interest, the trial court in its discretion may dismiss the litigation subject to guaranteeing the claimant's right to an adjudication in a suitable forum.

CONCLUSION

The conflict between the maritime doctrine of *forum non conveniens* and Louisiana's procedural law presents an important federal question which, petitioner respectfully submits, warrants resolution by the Supreme Court. The very

essence of maritime commerce mandates that its participants have contact with multiple locations whose courts apply differing laws, jurisprudence and procedures. The uniformity of American admiralty law protects the rights of all maritime parties - plaintiffs and defendants in state and federal court - to an adjudication of disputes in a fashion consistent with the essential characteristics of admiralty. The "saving to suitors" clause allows maritime claimants access to state courts while preserving the application of uniform admiralty principles, including the doctrine of *forum non conveniens* which protects the legitimate interests of all litigants. The decision below undermines that protection and stands in direct conflict with explicit federal authority. Accordingly, petitioner respectfully prays for a writ of certiorari to review the decision pursuant to Supreme Court Rules 10.1(b) and 10.1(c).

Respectfully submitted,

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APPENDIX a
CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

* * * * * * * * * * *

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

* *

JUDGMENT

This matter came on for hearing on September 21, 1990, on the exceptions of American Dredging Company for lack of jurisdiction *in personam* and, alternatively, for dismissal by reason of *forum non conveniens*. The court has considered the briefs and memoranda of counsel, reviewed the authorities cited therein; and after weighing the arguments of counsel, the court entered its Reasons for Judgment on September 25, 1990.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the exception of defendant, American Dredging Company, for lack of jurisdiction *in personam* is denied but that the exception under the doctrine of *forum non conveniens*, is granted, and this matter is dismissed subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania.

New Orleans, Louisiana, this 28th day of September, 1990.

/s/ Gerald P. Fedoroff
JUDGE, CIVIL DISTRICT COURT

Respectfully submitted,

_____

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CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NO. 89-25877 DIVISION "E"

****

WILLIAM R. MILLER, SR.
VERSUS
AMERICAN DREDGING COMPANY

FILED:_____ DY. CLERK:_____

****

REASONS FOR JUDGMENT

I am convinced that the appointment of an agent for service of process forecloses any due process argument American Dredging may have had. The question remains whether Louisiana has sought to exercise jurisdiction in cases such as this. Due process does not require it to do so. *Perkins v. Benquet Consolidated Mining Co.*, 342 U.S. 437 (1952). Under the laws pertaining to foreign corporations before the 1968 amendments, it was clear that appointment of an agent did not constitute consent to be sued on causes of action arising outside Louisiana. *Staley-Wynne Oil Corp. v. Loring Oil Co.*, 162 So. 756 (La. 1935). This limitation was probably eliminated in the 1968 amendments. *Smith v. Globe Indemnity Co.*, 243 So. 2d 882 (1st Cir. 1971). It certainly was eliminated by the addition of Paragraph B to R.S. 13:3201. The exception to personal jurisdiction will be overruled.

It is patent that the Civil District Court is not a convenient forum. Selection of this Court, having absolutely no connection with the case, is forum shopping of the worse sort. C.C.P. Art. 124 (C) would if valid prevent transfer of this maritime claim out of state.

In *Markzannis v. Bermuda Starline*, 545 So. 2d 537 (La. 1989) in a per curiam opinion granting a peremptory writ, the Supreme Court held that the limitation of C.C. Art. 123 (C) prevails over a contrary federal rule. In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), the Federal Fifth Circuit Court wrote (at p. 324):

> Under the federal uniformity doctrine state courts must apply the forum non conveniens rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction.

I do not feel bound by a per curiam opinion granting a peremptory writ in the face of a clearly contrary and authoritative pronouncement by a Federal Court of Appeal on an issue of federal law.

Counsel for defendant has been asked to prepare an appropriate order.

NEW ORLEANS, LOUISIANA this 25th day of September, 1990.

/s/ Gerald P. Fedoroff
J U D G E

APPENDIX b

WILLIAM R. MILLER, SR. NO. 90-C-2175

VERSUS COURT OF APPEAL

AMERICAN DREDGING COMPANY FOURTH CIRCUIT

STATE OF LOUISIANA

****

ON APPEAL FROM CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
NO. 89-25877, DIVISION "E"
HONORABLE GERALD P. FEDOROFF, JUDGE

****

The issue in this litigation is whether the federal maritime defense of "forum non conveniens" is applicable to this Jones Act claim filed in the state court.

William R. Miller, plaintiff, is a resident of Mississippi. In August of 1987 he travelled to Pennsylvania seeking employment. He joined the Union of Operating Engineers, Local 25 in Philadelphia. He was hired by American Dredging Company (ADC), a Pennsylvania Corporation to work on the tug "John R". On or about December 12, 1987, while aboard that vessel navigating the Delaware River, Miller was injured. Initially he was treated at the Sacred Heart Medical Center in Chester, Pennsylvania. He received additional treatment at the Hospital for Joint Diseases Orthopedic Institute located in New York. In February, 1988 Miller return to Mississippi where he has been treated by various doctors along the Mississippi Gulf Coast.

ADC's principal office is in Camden, New Jersey. Although ADC is licensed to do business in Louisiana, the tug "John R" has never navigated Louisiana waters.

Miller filed the instant Jones Act and General Maritime Claim in the Civil District Court for the Parish of Orleans. Service was perfected on ADC's registered agent. In response ADC filed exceptions of lack of *in personam* jurisdiction and *forum non conveniens*.

The trial court denied ADC's exception to the jurisdiction but granted the *forum non conveniens* exception. The court dismissed Miller's suit "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." The trial court reasoned that state courts must apply the forum non conveniens rule of the general maritime law in this maritime proceeding instituted in state court. Miller perfects this appeal.

The *forum non conveniens* defense is a characteristic feature of the general maritime law. *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990). In *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 305 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140, 108 S.Ct. 1684 (1988), the U.S. Fifth Circuit stated:

> Under the federal uniformity doctrine state courts must apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime defense. *Id.* at 324.

Despite this clear federal jurisprudence, Miller argues that the trial court erred. In support, he cites Code of Civil Procedure Article 123, and our Supreme Court's "per curiam" opinion in *Markzannes v. The Bermuda Star Line*, 545 So. 2d 537 (La. 1989).

In *Markzannes*, this Court, in an unpublished opinion, held that the state district court must apply the *forum non conveniens* rule of general maritime law where a foreign citizen brought an admiralty suit in state court. In a per curiam opinion, our Supreme Court, citing La. C.C. Pro. Art. 123(c), held that "Louisiana courts may apply Louisiana procedural law in causes of action brought in Louisiana courts."

Code of Civil Procedure Article 123, sections B and C provide as follows:

> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the

> defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC Sec. 688 or federal maritime law.

Miller argues that, despite the federal pronouncements to the contrary, we are bound by the *Markzannes* holding and the provisions of Article 123(C).

The Federal Fifth Circuit, in *Ikospentakis, supra*, noted that "a federal maritime defense of *forum non conveniens* is constitutionally supreme in a maritime or Jones Act case over state laws that do not recognize this doctrine." *Id.* at 180, citing *Exxon Corp. v. Chick Kam Choo, supra.* The Court went on to recognize Louisiana's failure to abide by this doctrine and stated that "[a]t some point, Louisiana must bend to the federal courts' construction of federal law." *Id.*

In the instant case, the trial court reasoned that the Supreme Court's per curiam holding in *Markzannes* was not binding, and maintained ADC's exception based on an application of federal law. We agree with this reasoning.

In the face of clear pronouncements by the Federal judiciary that maritime cases filed in state court must be governed by the federal doctrine of *forum non conveniens*, we are compelled to apply that defense in the instant case. We agree with the trial court's factual conclusion that Louisiana has absolutely no connection with this case. Neither party is a

Louisiana resident; the accident occurred on the Delaware river; plaintiff was treated in Pennsylvania, New York and Mississippi; the vessel on which he was injured has never navigated Louisiana's waters. The only semblance of connexity with Louisiana is the fact that ADC has a registered agent here. That alone is not enough.

Accordingly, we affirm the trial court's judgment.

AFFIRMED.

APPENDIX c

WILLIAM ROBERT MILLER, SR.

v.

AMERICAN DREDGING COMPANY

NO. 91-C-1524

Supreme Court of Louisiana.

On Writ of Certiorari to the Court of Appeal, Fourth Circuit, Parish of Orleans, State of Louisiana.

MARCUS, Justice

In August 1987, William R. Miller, a Mississippi resident, moved to Pennsylvania and was employed as a seaman by the American Dredging Co. (ADC), a Pennsylvania corporation with its principal place of business in Camden, New Jersey, and with a registered agent for service of process in New Orleans, Louisiana.[1] Miller was injured on the Delaware River while in the course and scope of his employment on the M/V JOHN R., a vessel owned by ADC. He received medical treatment in Pennsylvania and New York, and in February, 1988, returned to Mississippi, where he received additional treatment from physicians in the Mississippi Gulf Coast area. On December 1, 1989,

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[1] ADC had not done any dredging business in Louisiana since 1983; however, it maintains an agent for service of process in New Orleans in order to preserve its right to bid on Army Corps of Engineers projects.

Miller filed a Jones Act (46 U.S.C. § 688) and general maritime claim pursuant to the "saving to suitors" provision in 28 U.S.C. § 1333[2] against ADC in the Civil District Court for the Parish of Orleans. ADC filed exceptions of lack of jurisdiction in personam and, alternatively, forum non conveniens. The trial court denied the exception of lack of jurisdiction in personam, but granted the exception of forum non conveniens and ordered the matter dismissed "subject to the right of plaintiff to pursue this claim in a court of competent jurisdiction in Pennsylvania." Miller appealed. The court of appeal affirmed.[3] Upon Miller's application, we granted certiorari to consider the correctness of that decision.[4]

The sole issue before us is whether a Louisiana

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[2] 28 U.S.C. § 1333 provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* [emphasis added]

[3] 580 So. 2d 1091 (La. App. 4th Cir. 1991).

[4] 587 So. 2d 684 (La. 1991).

court in a Jones Act/general maritime case is required to apply the federal forum non conveniens law.[5]

Forum non conveniens is a doctrine by which a court "may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The doctrine has been recognized in federal admiralty law since at least 1801. *Bickel, The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Admiralty*, 35 Cornell L.Q. 12 (1949). The modern form of the doctrine in federal courts originated in 1947 in the *Gilbert* case, and this federal doctrine has been adopted by thirty-two states and the District of Columbia. Robertson & Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 Tex. L. Rev. 937, 950 (1990). By contrast, Louisiana courts have refused to apply the common law doctrine of forum non conveniens, finding it "foreign to our jurisprudence." *Trahan v. Phoenix Insurance Co.*, 200 So. 2d 118 (La. App. 1st Cir. 1967).

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[5] We note at the outset that the facts of the instant case would not present an issue of forum non conveniens for the federal courts, since they could transfer (as opposed to dismiss for forum non conveniens) the case pursuant to 28 U.S.C. § 1404(a):

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Our state courts have no such mechanism to transfer the case out of the state; and their only option is dismissal of the case. Thus, the question before us is one of dismissal for forum non conveniens, not transfer.

After *Trahan*, the legislature enacted article 123 of the Code of Civil Procedure. That article, in its present form, provides:

> **Art. 123.** ***Forum non conveniens.***
>
> A. For the convenience of the parties and the witnesses, in the interest of justice, a district court upon contradictory motion, or upon the court's own motion after contradictory hearing, may transfer a civil case to another district court where it might have been brought; however, no suit brought in the parish in which the plaintiff is domiciled, and in a court which is otherwise a court of competent jurisdiction and proper venue, shall be transferred to any other court pursuant to this Article.
>
> B. Except as provided in Paragraph C, upon the contradictory motion of any defendant in a civil case filed in a district court of this state in which a claim or cause of action is predicated solely upon a federal statute and is based upon acts or omissions originating outside of this state, when it is shown that there exists a more appropriate forum outside of this state, taking into account the location where the acts giving rise to the action occurred, the convenience of the parties and witnesses, and in the interest of justice, the court may dismiss the suit without prejudice; however, no suit in which the plaintiff is domiciled in this state, and which is brought in a court which is otherwise a court of competent jurisdiction and proper venue, shall be dismissed pursuant to this Article. In the interest of justice, and before the rendition of the judgment of dismissal, the court shall require the

> defendant or defendants to file with the court a waiver of any defense based upon prescription, provided that a suit on the same cause of action is commenced in a court of competent jurisdiction within sixty days from the rendition of the judgment of dismissal.
>
> C. The provisions of Paragraph B shall not apply to claims brought pursuant to 46 USC § 688 [the Jones Act] of federal maritime law.
>
> [Emphasis added].

Louisiana courts may not dismiss cases for forum non conveniens except as provided in this article. *Fox v. Board of Supervisors*, 576 So. 2d 978 (La. 1991).

A clear reading of article 123(c) leads to the conclusion that the doctrine of forum non conveniens is specifically made unavailable in a Jones Act or maritime law case. That was the holding of this court in *Markzannes v. Bermuda Star Line*, 545 So. 2d 537 (La. 1989) (per curiam), *cert. denied*, 110 S.Ct. 837 (1990), and the court of appeal in *Kassapas v. Akron Shipping Agency, Inc.*, 485 So. 2d 565 (La. App. 5th Cir. 1986), *writ denied*, 488 So. 2d 203 (La. 1986), *cert. denied*, 479 U.S. 940 (1986). However, the lower courts in the instant case chose not to rely on those precedents, finding instead that the doctrine of forum non conveniens is a "characteristic feature of the general maritime law" governed by federal, rather than state law. In support, the court of appeal cited the federal Fifth Circuit's opinions in *Ikospentakis v. Thalassic S.S. Agency*, 915 F.2d 176 (5th Cir. 1990), and *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988).

As a general proposition, a maritime claim brought in state courts is governed by the same principles as govern actions brought in admiralty, i.e., federal maritime law. *Green v. Industrial Helicopters*, 91-C-0859 c/w 91-C-0860 (La. Jan. 21, 1992) (citing *Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063, 1065 n.5 (5th Cir. 1981)). However, it is well settled that a state court, having concurrent jurisdiction with the federal courts as to in personam admiralty claims, is free to adopt such remedies, and to attach to them such incidents as it sees fit so long as it does not attempt to make changes in the substantive maritime law. *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *Lavergne v. Western Co. of North America*, 371 So. 2d 807 (La. 1979). Thus, the focus of our inquiry must be whether the doctrine of forum non conveniens is a fundamental feature of admiralty law, such that our contrary state law rule would be preempted.

Although the United States Supreme Court has yet to address the doctrine of forum non conveniens in a Jones Act/admiralty case, we find that the Court has addressed the doctrine in the context of the Federal Employers' Liability Act (FELA). In *Southern R. Co. v. Mayfield*, 340 U.S. 1 (1950), the Supreme Court addressed the issue of whether Missouri could apply its forum non conveniens rule in the context of a FELA claim brought in a Missouri state court. In finding that the state rule could apply, the Court stated:

> According to its own notions of procedural policy, a State may reject, as it may accept, the doctrine [of forum non conveniens] for all causes of action begun in its courts. If denial of a motion to dismiss an action under the Federal Employers' Liability

> Act is rested on such a general local practice, no federal issue comes into play.
>
> 340 U.S. at 3.

Since the Jones Act is based upon and incorporates by reference the FELA, *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942), we find this case persuasive in the matter before us.

Likewise, we find it instructive to look to the decisions of the federal courts sitting in diversity actions. Under *Erie v. Tompkins*, 304 U.S. 64 (1938), the federal courts in diversity actions must apply state substantive law and federal procedural law. In *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court was faced with the issue of whether to apply the state or federal forum non conveniens law in a diversity action. The court held that a federal court in diversity was required to apply the federal forum non conveniens law:

> We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important that the disruption of uniformity created by applying federal forum non conveniens in diversity cases.
>
> 821 F.2d at 1159.

The Eleventh Circuit reached a similar result in *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir. 1985), finding that forum non conveniens was not a part of the state substantive law for *Erie* purposes:

> The forum non conveniens doctrine is a rule of venue, not a rule of decision . . . In contrast, "rules of decision" are the "substantive" law of the state, the "legal rules [which[determine the outcome of a litigation." [citation omitted].

757 F.2d at 1219.

Under the so-called "reverse-Erie" doctrine approved by the Court in *Offshore Logistics v. Tallentine*, 477 U.S. 207, 223 (1986), these cases suggest that the forum non conveniens doctrine should not be considered part of the substantive federal admiralty law in a "saving to suitors" case, any more than the doctrine is part of the state substantive law for *Erie* purposes. *See* Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul*, 18 J. of Mar. L. & Com. 185, 199 (1987). Further, the interests of self-regulation, administrative independence, and self-management which have influenced the federal courts to apply federal forum non conveniens in diversity cases are equally applicable to the Louisiana's interest (as expressed by our legislature in La. Code Civ. P. art. 123) in applying the state forum non conveniens rule in Jones Act/general maritime cases.

Turning to the facts of the present case, we see nothing which would lead us to believe the application of our state forum non conveniens rule deprives the litigants of a substantive right under the federal maritime law. Clearly, application of our state rule will not be outcome determinative of the case, since the law of the case (Jones Act and general maritime law) will be identical, whether the case is heard in

Louisiana or Pennsylvania.[6] Louisiana has jurisdiction over the case, and Louisiana courts have an interest in the matter, since

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[6] In theory, forum non conveniens should never be outcome determinative. For example, if federal choice of law principles mandated that Greek law applies to a case, both a Louisiana court and a federal court would apply Greek law, although the federal court would have the option of dismissing the case under forum non conveniens to allow it to be re-filed in Greece. Nonetheless, the law of the case, whether applied by a Louisiana court, a federal court, or a Greek court would be Greek law. In practice, however, a forum non conveniens dismissal can be outcome determinative in one unique situation: where federal choice of law principles determine that American law applies, but where there is no realistic chance that a foreign court would apply American law to the case. Edelman, *Forum Non Conveniens: Its Application in Admiralty Law*, 15 J. of Mar. L. & Com. 517, 530 (1984). The federal circuits have split on whether such a case may ever be dismissed on forum non conveniens. The Ninth, Tenth, and Eleventh Circuits have refused to dismiss cases for forum non conveniens if American law (i.e., the Jones Act), applies. *See Zipfel v. Halliburton Co.*, 832 F.2d 1477 (9th Cir. 1987); *Needham v. Phillips Petroleum Co. of Norway*, 719 F.2d 1481 (10th Cir. 1983); *Szumlicz v. Norwegian American Lines, Inc.*, 698 F.2d 1192 (11th Cir. 1983). *See also LaSerguridad v. Transytur Line*, 707 F.2d 1304, 13[illegible] (11th Cir. 1983). By contrast, the Second Circuit in *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2d Cir. 1983), found that the doctrine of forum non conveniens applied to a Jones Act case. The Fifth Circuit initially agreed with the majority view, and held a federal court was required to retain jurisdiction in a Jones Act case. *See Nichol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289 (5th Cir. 1984). However, in *In Re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 n. 25 (5th Cir. 1987), *vacated on other grounds and remanded*, 109 S.Ct. 1928 (1988), *reinstated in pertinent part*, 883 F.2d 17 (5th Cir. 1989), the court in a footnote to a non-Jones Act case disapproved its prior line of cases and applied forum non conveniens to Jones Act cases.

By not allowing for any forum non conveniens dismissals, our state law rule avoids ever creating a situation where the dismissal may be outcome determinative. We also note that our state rule is in accord with the majority of the federal circuits.

defendant has done work in the state in the past and maintains an agent for service of process here. Thus, the only interest of defendant affected by the application of our state procedure is one of convenience. We find this interest by itself does not rise to the level of a substantial right.

In sum, we find that the doctrine of forum non conveniens is not a substantive feature of the general maritime law. Accordingly, we find application of Louisiana's forum non conveniens rule is not preempted by federal admiralty law. Since our procedural rule precludes dismissal of this Jones Act/ general maritime case on the ground of forum non conveniens, the lower courts erred in holding otherwise.

DECREE

For the reasons assigned, the judgment of the court of appeal is reversed. The exception of forum non conveniens is overruled. The case is remanded to the district court for further proceedings in accordance with law.

AFFIDAVIT OF SERVICE

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority duly commissioned and qualified in the aforesaid state and parish, came and appeared:

THOMAS J. WAGNER

who, after being sworn by me, did depose and say: that he is the counsel of record for petitioner American Dredging Company, and that three copies of this Petition were served on respondent William R. Miller, Sr. through his attorney of record delineated below by first-class mail, postage pre-paid on this 28 day of May, 1992.

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Counsel of Record for Petitioner

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 28th DAY OF MAY, 1992.

A. Cynthia Martin

NOTARY PUBLIC
My commission expires: at death